

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT DANVILLE, VA
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JOHN F. CORCORAN, CLERK
BY: *H. McDonald*
DEPUTY CLERK

PATRICK EARL FRANCIS,)	
Petitioner,)	Civil Action No. 7:05CV00789
)	
v.)	<u>FINAL ORDER</u>
)	
UNITED STATES OF AMERICA,)	By: Hon. Jackson L. Kiser
Respondent.)	Senior United States District Judge

In accordance with the memorandum opinion entered this day, it is now

ADJUDGED AND ORDERED

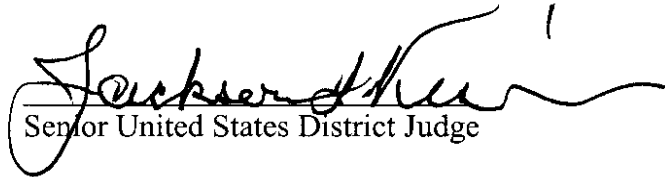
that the petitioner's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure shall be and hereby is **CONSTRUED** as a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, and **DISMISSED** without prejudice as successive. This action shall be **STRICKEN** from the active docket of the court.

The petitioner is hereby advised of the procedure for obtaining certification from the United States Court of Appeals for the Fourth Circuit to have this court review a successive § 2255 motion. The petitioner must submit a copy of a successive § 2255 motion to the Fourth Circuit, along with a motion requesting a three-judge panel certification that the district court may review the successive § 2255 motion. See 28 U.S.C. § 2244. A Fourth Circuit form and instructions for filing this motion will be included with this notice and are available from the Fourth Circuit at the following address: Office of the Clerk, United States Court of Appeals for the Fourth Circuit, 900 E. Main St., Richmond, VA 23219.

The Clerk is directed to send certified copies of this order and the accompanying

memorandum opinion to the petitioner and counsel of record for the respondent, if known.

ENTER: This 6th day of January, 2006.


Senior United States District Judge

United States Court of Appeals for the Fourth Circuit

**Instructions for Filing Motion Under 28 U.S.C. § 2244 For Order
Authorizing District Court to Consider Second or Successive
Application for Relief Under 28 U.S.C. §§ 2254 or 2255**

1. Use the attached form to file a **Motion Under U.S.C. § 2244 For Order Authorizing District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255**.
2. Answer completely all the questions on the attached form. Your failure to provide complete answers may result in the Court's denying your motion.
3. **Attach to your motion copies of the following documents:**
 - A. The § 2254 or § 2255 applications you want to file in the district court if the Court of Appeals grants your motion.
 - B. All § 2254 or § 2255 applications you previously filed in any **federal** court challenging the judgment of conviction or sentence you now want to challenge.
 - C. All court opinions and orders, final and interlocutory, disposing of the claims in your previous § 2254 or § 2255 applications that challenged the judgment of conviction or sentence you now want to challenge.
 - D. All magistrate judge's reports and recommendations issued in all previous § 2254 or § 2255 applications that challenged the judgment or conviction or sentence you now want to challenge.
4. You must **sign the motion in three places** at the end of page 4. Your failure to sign the motion or to complete the Proof of Service may result in the Court's denying your motion.
5. You must file with the Court of Appeals the **original and three copies of your motion and all documents attached to it**. Your failure to provide the original and three copies may result in the Court's denying your motion.
6. If your motion seeks relief under 28 U.S.C. § 2254, you must serve a copy of the motion and all documents attached to it on the attorney general of the state in which you are confined. Your failure to serve the attorney general may result in the Court's denying your motion.
7. If your motion seeks relief under 28 U.S.C. § 2255, you must serve a copy of the motion and all documents attached to it on the United States Attorney for the federal judicial district in which you were convicted. Your failure to serve the United States may result in the Court's denying your motion.

MOTION UNDER 28 U.S.C. § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER
SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §§ 2254 OR 2255

United States Court of Appeals for the Fourth Circuit

Name of Movant	Prisoner Number	Case Number (leave blank)
Place of Confinement		

IN RE: _____, MOVANT

1. Name and location of court which entered the judgment of conviction from which relief is sought:

2. Parties' Names: _____ vs. _____

3. Docket Number: _____ 4. Date Filed: _____

5. Date of judgment of conviction: _____ 6. Length of sentence: _____

7. Nature of offense(s) involved (all counts):

8. What was your plea? (Check one) ☐ Not Guilty ☐ Guilty ☐ Nolo Contendere

9. If you pleaded not guilty, what kind of trial did you have? (Check one) ☐ Jury ☐ Judge only

10. Did you testify at your trial? (Check one) ☐ Yes ☐ No

11. Did you appeal from the judgment of conviction? (Check one) ☐ Yes ☐ No

12. If you did appeal, what was the

Name of court appealed to: _____

Parties' names on appeal: _____ vs. _____

Docket number of appeal: _____ Date of decision: _____

Result of appeal: _____

13. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court? ☐ Yes ☐ No

14. If you answered "Yes" to question 13, answer the following questions:

A. FIRST PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? _____

(2) What were the parties' names? _____ vs. _____

(3) What was the docket number of the case? _____

(4) What relief did you seek? _____

(5) What grounds for relief did you state in your petition, application, or motion?

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☐ No

(7) What was the result? ☐ Relief granted ☐ Relief denied on the merits
☐ Relief denied for failure to exhaust ☐ Relief denied for procedural default

(8) Date of court's decision: _____

B. SECOND PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? _____

(2) What were the parties' names? _____ vs. _____

(3) What was the docket number of the case? _____

(4) What relief did you seek? _____

(5) What grounds for relief did you state in your petition, application, or motion?

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☐ No

(7) What was the result? ☐ Relief granted ☐ Relief denied on the merits
☐ Relief denied for failure to exhaust ☐ Relief denied for procedural default

(8) Date of court's decision: _____

C. THIRD AND SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS

For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) through (8) above for first and second petitions, applications, or motions.

D. PRIOR APPELLATE REVIEW(S)

Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction over your case? If so, list the docket numbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion	<input type="checkbox"/> Yes	Appeal No. _____	<input type="checkbox"/> No
Second petition, application, or motion	<input type="checkbox"/> Yes	Appeal No. _____	<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input type="checkbox"/> Yes	Appeal No. _____	<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input type="checkbox"/> Yes	Appeal No. _____	<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input type="checkbox"/> Yes	Appeal No. _____	<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input type="checkbox"/> Yes	Appeal No. _____	<input type="checkbox"/> No

If you did not appeal from the denial of relief on **any** of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.

15. Did you present any of the claims in this application in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255? (Check one) ☐ Yes ☐ No

16. If your answer to question 15 is "Yes," give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied.

17. If your answer to question 15 is "No," why not? This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous § 2254 or § 2255 application because . . .

A. (For § 2255 motions only) the claims involve "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [you] guilty"; or,

B. (For § 2254 petitions only) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [you] guilty of the offense"; or,

C. (For both § 2254 and § 2255 applicants) the claims involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

I did not present the following claims in any previous petition, application, or motion for relief under 28 U.S.C. § 2254:

I did not present the claims listed above in any previous petition, application, or motion because

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct. Executed

on

[date]

Movant's Signature

P R O O F O F S E R V I C E

A copy of this motion and all attachments must be sent to the state attorney general (§ 2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§ 2255 cases).

I certify that on _____ I mailed a copy of this motion and all attachments
[date]

to _____ at the following address:

Movant's Signature